Supreme Court, U.S.
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No. 96-751

In The

Supreme Court of the United States

October Term, 1996

JAMES P. SCIARRINO,

Petitioner,

vs.

CITY OF KEY WEST,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Should the Court, in its certiorari discretion, review *Sciarrino v. City of Key West, Florida*, 83 F.3d 364 (11th Cir. 1996) (Pet. App. A), which affirmed the District Court's (Southern District of Florida) decision, *Sciarrino v. City of Key West*, 867 F. Supp. 1017 (S.D. Fla. 1994) (Pet. App. B).

Stated otherwise, are there special and important reasons for the Court to exercise its certiorari jurisdiction where the Eleventh Circuit, in affirming the District Court's judgment that the commercial speech ordinance at issue does not violate the First Amendment, has not rendered a decision which conflicts with any other Federal Court on the same issue?

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Contents..... ii

Table of Authorities iii

Opinion and Judgment Below..... 1

Statement of the Case 2

Summary of the Argument 6

Argument 9

Conclusion 17

TABLE OF AUTHORITIES

Page

CASES:

44 Liquormart v. Rhode Island, 116 S.Ct. 1495 (1996) 8, 12, 13, 14, 15, 16

Board of Trustees of State University of New York v. Fox, 492 U.S. 469 (1989) 10

Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980) ..... *passim*

Edenfield v. Fane, 507 U.S. 761 (1993) 11

Florida Bar v. Went-For-It, Inc., 115 S.Ct. 2371 (1995) 11

Hays County Guardian v. Supple, 969 F.2d 111 (5th Cir. 1992) 6, 7, 9, 10

Kastigar v. United States, 406 U.S. 441 (1972) 14

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) 10

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 12

Sciarrino v. City of Key West, 83 F.3d 364 (11th Cir. 1996) ..... *passim*

Sciarrino v. City of Key West, 867 F. Supp. 1017 (S.D. Fla. 1994) 1, 6, 10

Supersign of Boca Raton, Inc. v. City of Fort Lauderdale, 766 F.2d 1528 (11th Cir. 1985) 10

STATUTES:

Ordinance No. 92-12, City of Key West (commonly known as Off-Premises Canvassing or "OPC" Ordinance) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS:

First Amendment ..... *passim*

BRIEF IN OPPOSITION

Respondent, City of Key West, Florida, opposes the issuance of a writ of certiorari to review the judgment and affirmance of the United States Court of Appeals for the Eleventh Circuit Court and the United States District Court for the Southern District of Florida in the above-entitled case.

OPINION AND JUDGMENT BELOW

Following a bench trial, on October 27, 1994, the United States District Court for the Southern District of Florida issued Findings of Fact and Conclusions of Law. *Sciarrino v. City of Key West*, 867 F. Supp. 1017, 1020 (S.D. Fla. 1994). The District Court found for the City of Key West on Petitioner's claim that the subject ordinance violated the First Amendment and entered judgment accordingly. Specifically, the District Court concluded that the subject ordinance passes scrutiny under the test for commercial speech regulations set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

On May 16, 1996, after the parties had filed briefs and presented oral argument, the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's judgment for the City of Key West. *Sciarrino v. City of Key West*, 83 F.3d 364 (11th Cir. 1996). Thereafter, Petitioner filed a Motion for Rehearing, which was denied on August 14, 1996, and is unreported.

STATEMENT OF THE CASE

The respondent submits the following brief Statement to correct several inaccuracies and omissions contained in Petitioner's Statement of the Case.

Petitioner has omitted the relevant context in which this case arises. Key West is a small city located at the end of a chain of islands extending from the southern tip of the Florida mainland. Key West couples a festive, tropical atmosphere with a Historic District which includes homes once inhabited by Ernest Hemingway and President Harry Truman. These features attract many visitors each year to Key West, many of whom are drawn to the Historic District.

Petitioner owns and operates a restaurant and bar known as Clancy's Gourmet Pizza ("Clancy's"). Clancy's is located approximately one-half block off of Duval Street in the heart of the Historic District.

Petitioner also fails to describe the activity being regulated. Prior to November 12, 1991, numerous businesses, including Petitioner's, employed or contracted with persons commonly known as "barkers." Barkers engaged in face-to-face advertising, including distribution of advertising materials to, and/or solicitation of, customers along the sidewalks and public right-of-ways within the City of Key West. This form of advertising, generally referred to as "off-premises canvassing," involved confronting pedestrians on the streets and urging them to patronize various businesses. This form of advertising had both visual and physical aspects – pedestrians would have printed advertisements literally foisted upon them. Additionally, this practice had audio aspects,

including the constant "hawking" of the various businesses; hence the moniker, "barkers."

Nor does Petitioner include that the regulation at issue was enacted in reaction to problems created by off-premises canvassing. In response to complaints[1] regarding the barkers and after extensive public hearings and workshops,[2] the City passed the Off-Premises Canvassing ("OPC") Ordinance.

Petitioner's most glaring omission is that he neglects to advise the Court of the nature of the OPC Ordinance. The most relevant characteristic of the OPC Ordinance is that it does ***not*** totally ban or eliminate any form of communication. Rather, the OPC Ordinance regulates, on a limited basis, the use of government owned streets, sidewalks, and public right-of-ways to persons who seek to engage in face-to-face advertising, distribution of

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[1] Specifically, the complaints included claims that pedestrians could not walk down the sidewalk without constantly having advertising materials thrust upon them; increased trash because of the improper disposition of the advertising materials; increased congestion along the sidewalks; disputes between barkers competing for locations; and, on some occasions, merchants complained that the proliferation of off-premises canvassers obstructed or interfered with customers who wished to enter their business premises.

[2] During these public hearings, numerous persons spoke in favor of regulating off-premises canvassing activity and testified concerning the problems and complaints they had experienced or observed concerning the activity, including the lack of pedestrian privacy, sidewalk congestion, lack of access to some businesses, litter, and the need to preserve the atmosphere and appearance of Key West's Historic District.

advertising materials, and solicitation of customers.[3] Specifically, the OPC Ordinance affects only certain public areas and restricts the physical location of the barkers on a few heavily trafficked streets in the Historic District. Barkers who have obtained an appropriate permit are free to hawk their wares within these parameters. Moreover, a myriad of other forms of advertising remain available.

Key West's goals in enacting the OPC Ordinance, also omitted by Petitioner, are critical to the legal analysis. In adopting the OPC Ordinance, the City sought (1) to maintain a minimum level of pedestrian privacy for the persons who use the streets, sidewalks, and other public right-of-ways; (2) to reduce congestion of sidewalks and other public right-of-ways within the Historic District and to prevent canvassers and their prospective customers from gathering in such numbers as to block the entrances to businesses along the public right-of-ways; (3) to decrease litter by reducing the amount of often unwanted handbills; and (4) to maintain and improve the

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[3] In pertinent part, the OPC Ordinance:

(a) establishes a permitting system for persons who seek to use government owned streets, sidewalks, and right-of-ways to engage in off-premises canvassing activity;

(b) prohibits off-premises canvassing activity in publicly owned parking lots, beaches, and Mallory Dock; and

(c) imposes limitations on off-premises canvassing activity within the City's Historic District along Duval Street, Front Street, Clinton Square, and portions of Whitehead and Simonton Streets.

visual appearance and atmosphere of Key West's Historic District.

While not mentioned by Petitioner, following the adoption of the OPC Ordinance, most restaurants, time share resorts, and other businesses came into compliance with the Ordinance. As a result of this compliance, the City received fewer complaints from pedestrians and business owners arising from unwanted confrontations and sidewalk congestion. Additionally, the City observed a reduction in the amount of litter generated by the distribution of printed advertising materials.

Petitioner also fails to mention that from approximately October 1, 1990 through the present, barkers acting on his behalf have engaged in off-premises canvassing within Key West's Historic District to promote Petitioner's restaurant. In addition to using off-premises canvassing, since opening his restaurant, Petitioner has advertised in the *Southern Bell Yellow Pages, Key West Citizen, Timeout Magazine, The Best of Key West Magazine,* and *Solaris Hill Newspaper.* Petitioner also has distributed promotional menus and other printed handbills to promote his business. All of these avenues of expression remain open and unfettered.

Petitioner sued Key West, claiming that the OPC Ordinance violated the First Amendment and Florida Statute § 166.0443. At trial, Key West presented numerous witnesses who testified that the OPC Ordinance directly and materially advanced the legitimate interests of the City. The trial court entered judgment in favor of Key West and against Petitioner, finding the OPC Ordinance to be constitutional under *Central Hudson Gas & Electric Corp. v. Public Service Comm'n.*, 447 U.S. 557 (1980). On

appeal, the Eleventh Circuit agreed and affirmed the judgment of the District Court.

Petitioner now seeks review in this Court, claiming conflict and other grounds.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied because the decision rendered by the United States Court of Appeals for the Eleventh Circuit does not conflict with the applicable decisions of this Court or the decision of another United States Court of Appeals on the same issues and because there are no other special and important reasons for this Court to review the above-entitled case. In affirming the District Court's judgment in favor of the City of Key West, the Eleventh Circuit correctly applied the well-settled law established by this Court regarding commercial speech regulations and rendered a decision which is completely consistent with the prior relevant decisions of this Court and those of other United States Courts of Appeals on the same issue.

The *Sciarrino* Case does not Conflict with *Hays County Guardian v. Supple*

The Eleventh Circuit's decision in *Sciarrino v. City of Key West*, 83 F.3d 364 (11th Cir. 1996), does not conflict with *Hays County Guardian v. Supple*, 969 F.2d 111 (5th Cir. 1992). Rather, the two cases involve two different types of speech to which the respective courts properly applied two different First Amendment standards.

In *Hays* the court considered a regulation affecting a newspaper which contained political commentary. Because such speech is afforded a high degree of First Amendment protection, the *Hays* court found that the regulation at issue could not withstand constitutional scrutiny.

In contrast, the Eleventh Circuit in *Sciarrino* considered a limited regulation on commercial speech. Because commercial speech occupies a lesser place in the hierarchy of First Amendment values, the Eleventh Circuit correctly applied the test established by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), and concluded that the regulation survived constitutional scrutiny.

Because the courts applied different tests to different types of speech to which different degrees of First Amendment protection are afforded, the Eleventh Circuit decision in *Sciarrino* and the Fifth Circuit's decision in *Hays* do not conflict and no basis for certiorari jurisdiction exists.

Lack of Conflict with Other Commercial Speech Cases

The Eleventh Circuit's decision does not conflict with any other Federal Court on the issue of commercial speech regulation. *Central Hudson* and its progeny require that the challenged regulation directly and materially advance at least one of the government's asserted interests. Here, both the District Court and the Eleventh Circuit held that the OPC Ordinance does materially and directly advance the City of Key West's legitimate interests. Both lower courts cited extensive records evidence supporting this conclusion.

Furthermore, it cannot be emphasized enough that the OPC Ordinance is *not* a total ban on advertising. For this reason, Petitioner's reliance on *44 Liquormart v. Rhode Island*, 116 S.Ct. 1495 (1996), must fail.

44 Liquormart involved an absolute prohibition on advertising the price of alcohol throughout the state of Rhode Island. In contrast, the OPC Ordinance merely regulates where barkers can conduct their activity within the Historic District. The Ordinance affects only a few of the most heavily trafficked streets, Mallory Dock, and the public beaches and parking lots, not an entire state, as in *44 Liquormart*.

Because there is no conflict between the Eleventh Circuit's opinion and the relevant decisions of this Court, the Petition for Writ of Certiorari should be denied.

Proper Application of Central Hudson

Despite Petitioner's argument to the contrary, *Central Hudson* remains the standard by which commercial speech regulations are analyzed, a point most recently confirmed by this Court's decision in *44 Liquormart*. Petitioner's suggestion that *Central Hudson* be abandoned offends the concept of stare decisis, as well as the clear import of the Court's decision in *44 Liquormart*.

In *44 Liquormart* the Court had occasion to and did consider whether commercial speech should be afforded the same First Amendment protection as political speech. In applying *Central Hudson*, a majority of the Court acknowledged that commercial speech is properly analyzed under *Central Hudson* and rejected the more

rigorous inquiry used in political speech cases. Thus, there is no "open issue" of law to be decided by this Court.

Because the Eleventh Circuit did not decide any important question of federal law which has not already been addressed and settled by this Court, the Petition for Writ of Certiorari should be denied.

ARGUMENT

A. THE ELEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH *HAYS COUNTY GUARDIAN V. SUPPLE*, 969 F.2D 111 (5TH CIR. 1992)

The decision of the Eleventh Circuit does not conflict with any other circuit court decision. Specifically, Petitioner's suggestion that the Eleventh Circuit's decision conflicts with *Hays County Guardian v. Supple*, 969 F.2d 111 (5th Cir. 1992), is wholly unfounded.

Several critical distinctions, both factual and legal, preclude any conflict between the Eleventh Court's decision and *Hays*. Principally among these is the nature of the speech being regulated. In *Hays*, a university sought to regulate the distribution of a free newspaper which contained "political commentary." *Id.* at 118 (citations omitted). The *Hays* court noted that such speech was a "medium of communication . . . traditionally afforded great protection under the First Amendment." *Id.* (citations omitted). Because *Hays* did not involve commercial speech, a point which the Fifth Circuit emphasized in its analysis, the court did not apply the test set forth in *Central Hudson Gas & Electric Corp. v. Public Service*

Comm'n, 447 U.S. 557 (1980), but rather a more stringent First Amendment analysis. *Id.* at 120.

In contrast, the instant case involves commercial speech, which, as this Court has recognized, occupies "a subordinate position in the hierarchy of First Amendment values." *Id.* at 120. (citing *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 477-78 (1989)). Because this case involves only commercial speech, the District Court and the Eleventh Court both properly applied the four prong test set forth in *Central Hudson*. *Sciarrino v. City of Key West, Florida*, 83 F.3d 364, 367 (1996); *Sciarrino v. City of Key West*, 867 F. Supp. 1017, 1020 (S.D. Fla. 1994).

This case involves the limited regulation of what can only be described as "human signs." The City is not banning all communication. Rather, the OPC Ordinance merely requires that "barkers," who are virtually walking, talking, human billboards, conduct their advertising activity in certain areas. The City can regulate such advertising when it is accomplished through a billboard or movable signage. *See, e.g., Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); *Supersign of Boca Raton, Inc. v. City of Fort Lauderdale*, 766 F.2d 1528 (11th Cir. 1985). For this same reason, the City is free to regulate such activity when it appears in the form of a barker.

Because the cases involve different types of speech to which the courts applied different tests, the Eleventh Circuit's decision in *Sciarrino v. City of Key West*, 83 F.3d 364 (1996) and *Hays County Guardian v. Supple*, 960 F.2d 111 (5th Cir. 1992), are not in conflict. For this reason, the Petition for Writ of Certiorari should be denied.

B. THE ELEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH RELEVANT DECISIONS OF THE UNITED STATES SUPREME COURT

The purported conflict between the Eleventh Circuit's decision and decisions of this Court suggested by Petitioner, Petition at 6, is simply non-existent. The District Court and the Eleventh Circuit both applied the standards for commercial speech cases established by this Court in *Central Hudson* and its progeny. Specifically, the lower courts expressly found that the OPC Ordinance directly and materially advance the City's legitimate interests. *Sciarrino,* 83 F.3d at 369.

The Eleventh Circuit critically examined the City's asserted interests and concluded that at least two of these interests were directly advanced to a material degree.[4] *Id.* at 369-70. The Eleventh Circuit began its analysis of this, the fourth, prong of *Central Hudson* by quoting the relevant portion of *Edenfield v. Fane,* 507 U.S. 761 (1993): "[a] party seeking to justify [a] commercial speech restriction must prove that 'the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' " *Id.* at 368. Additionally, the Eleventh Circuit went so far as to identify ***how*** a governmental entity can satisfy its

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[4] Although the Eleventh Circuit did not find that the reduction in litter was appreciable, it found that the statute nonetheless survived constitutional scrutiny because the direct advancement of even one substantial interest is sufficient. *Sciarrino,* 83 F.3d at 369 (citing *Florida Bar v. Went For It, Inc.,* 115 S.Ct. 2371, 2376 n. 1 (1995)).

burden of showing that the regulation directly and materially advances its interests, citing studies, anecdotal evidence, testimony and photographs. *Id.*

The Eleventh Circuit concluded that, based upon its independent review of the factual record,[5] the OPC Ordinance satisfied the *Edenfield* standard. *Id.* at 369. In so concluding, the court enumerated the "extensive anecdotal evidence" demonstrating that the OPC Ordinance materially advanced the City's interests. *Id.* One, the court cited testimony regarding a "marked improvement" in pedestrian traffic. *Id.* at 369, n. 5. Two, the court found persuasive testimony that the number of complaints about harassment related to off premises canvassing "dropped off sharply" and "were substantially reduced if not eliminated." *Id.* Three, the court inferred that this testimony supported the conclusion that pedestrian congestion was "reduced considerably." *Id.* at 369, n. 6.

Petitioner's reliance on *44 Liquormart v. Rhode Island*, 116 S.Ct. 1495 (1996), fails because of the faulty premises upon which it rests. First, *44 Liquormart* does not represent the "evolution" in First Amendment jurisprudence that Petitioner asserts. Petition at 8-9. Rather, because the case involved purely commercial speech, the principal opinion in *44 Liquormart* applied, and thereby endorsed,

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[5] Petitioner's attempt to have this Court reevaluate the factual findings of the District Court and the Eleventh Circuit is improper, as Petitioner never has challenged these findings to be clearly erroneous. *See, Pullman-Standard v. Swint*, 456 U.S. 273 (1982) (findings of fact will not be set aside unless clearly erroneous). Besides being improper, Petitioner's untimely challenge to the factual record does not establish a conflict which would provide grounds for certiorari jurisdiction.

the *Central Hudson* analysis. *44 Liquormart*, 116 S.Ct. at 1506.

Petitioner further compounds this error with the misstatement that *44 Liquormart* and the instant case are "remarkably similar." Petition at 11. The instant case involves limited restriction on off-premises canvassing. It only regulates a few public areas and the most heavily trafficked streets in the Historic District. All other avenues of communication remain open and unfettered.

In contrast, the statute in *44 Liquormart* "constitute[d] a ***blanket prohibition*** against truthful, non-misleading advertising about a lawful product." *Id.* at 1508 (emphasis added). The "drastic nature of [the State's] chosen means" – an absolute ban – led the *44 Liquormart* Court to conclude that "there is far less reason to depart from the rigorous review that the First Amendment generally demands." *Id.* at 1509, 1507.

Thus, because the OPC Ordinance does not totally ban truthful, nonmisleading advertising, those concerns which led the *44 Liquormart* Court to consider a more stringent First Amendment standard do not arise here.[6]

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[6] Additionally, the *44 Liquormart* Court concluded that, even assuming that the State's asserted interest in promoting temperance was legitimate, there was no evidentiary support that the advertising ban would significantly advance that interest. *44 Liquormart*, 116 S.Ct. at 1509. Conversely, in the instant case, the Eleventh Circuit found the evidentiary record to be replete with evidence demonstrating that the OPC Ordinance significantly advanced the City's interests. *Sciarrino*, 83 F.3d at 369.

Additionally, Petitioner places unjustified reliance upon dicta in the concurring opinions of *44 Liquormart*. First, dicta, especially in a concurring opinion, does not constitute binding precedent. *See, Kastigar v. United States*, 406 U.S. 441, 454-55 (1972) (language not necessary to court's decision cannot be considered binding precedent). Second, the concurrences in *44 Liquormart* actually support the application of *Central Hudson* in the instant case. In his concurrence, Justice Scalia expressly declines to "declare *Central Hudson* wrong." *Id.* at 1517. Likewise, Justice O'Connor's opinion concurring with the judgment, in which Chief Justice Rhenquist, Justice Souter, and Justice Breyer joined, also applies the *Central Hudson* test. *Id.* at 1520, 1521. Finally, concurring in the judgment and Parts I, II, VI and VII of the principal opinion, Justice Thomas recommends that commercial speech be afforded a greater degree of constitutional protection where ***"the asserted interest is one that is to be achieved through keeping would-be recipients of the speech in the dark."*** *Id.* at 518 (emphasis added). Justice Thomas particularized this stricter test to the specific context of a total ban. *Id.*

Based upon the jurisprudence applied by the principal opinion and the concurrences in *44 Liquormart*, this Court continues to adhere to the *Central Hudson* analysis in commercial speech cases. Even taking into consideration the reservations of Justice Thomas, *Central Hudson* still would be applicable in the instant case, as this case involves only the limited regulation of barkers within the Historic District, not a total ban or an attempt to "keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace." *Id.* at 1515-16.

Finally, Petitioner's contention that the Eleventh Circuit's jurisprudence is somehow contrary to the "direction and language" of this Court likewise must be rejected. Petition at 9-10. While Petitioner maintains that the OPC Ordinance is a "de facto total ban," Petition at 10, this is not borne out by the record. The basis for the stricter standard by Justice Thomas in 44 *Liquormart* is the disfavor toward total bans on communication, which clearly is not the case here. *Sciarrino*, 83 F.3d at 366. Pursuant to the express language of the OPC Ordinance, Petitioner still may use barkers in the Historic District, as long as they obtain a permit and conduct their activity, for the busiest streets, in the designated locations. Thus, because the premise for a stricter standard – a total ban – is not present in the instant case, all of Petitioner's entreaties in favor of such a standard must fail.

Because there is no conflict between the Eleventh Circuit's opinion and the relevant decisions of this Court, the Petition for Writ of Certiorari should be denied.

C. THE ELEVENTH CIRCUIT APPLIED THE WELL-SETTLED LAW OF THIS COURT REGARDING COMMERCIAL SPEECH CASES

Up to and including its most recent opportunity to speak on the subject, this Court consistently has applied *Central Hudson* in commercial speech cases. *See e.g.*, 44 *Liquormart, supra*. Essentially, Petitioner is seeking to overturn *Central Hudson* and its progeny. As Justice Scalia asserted earlier this year, precedent provides no basis for declaring *Central Hudson* wrong or even the wherewithal to say what ought to replace it. *Id.* at 1515. In accordance

with the controlling precedent, commercial speech cases should be resolved based upon the existing jurisprudence. *See id.*

The City submits that, contrary to Petitioner's suggestion, this Court already has resolved the issue of whether commercial speech should be treated the same as political speech. Most recently, in *44 Liquormart*, the Court addressed the proper standard to be applied in commercial speech cases. The principal opinion, in which a majority of the Court concurred, conclusively demonstrates that *Central Hudson* is the appropriate test in commercial speech cases. This is especially true where, as here, the regulation does not constitute a total ban on truthful, nonmisleading communication. *See id.* at 1509, 1519. While some Members of the Court considered a different First Amendment analysis, a majority of the Court rejected those alternatives in favor of *Central Hudson*.

Thus, the issue which Petitioner claims to be open was in fact considered and resolved by the *44 Liquormart* Court. *Central Hudson* remains the controlling test in commercial speech cases. Accordingly, Petitioner's question has been answered, albeit, not in the manner in which he wishes.

Because the Eleventh Circuit did not decide any important question of federal law which has not already been addressed and settled by this Court, the Petition for Writ of Certiorari should be denied.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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